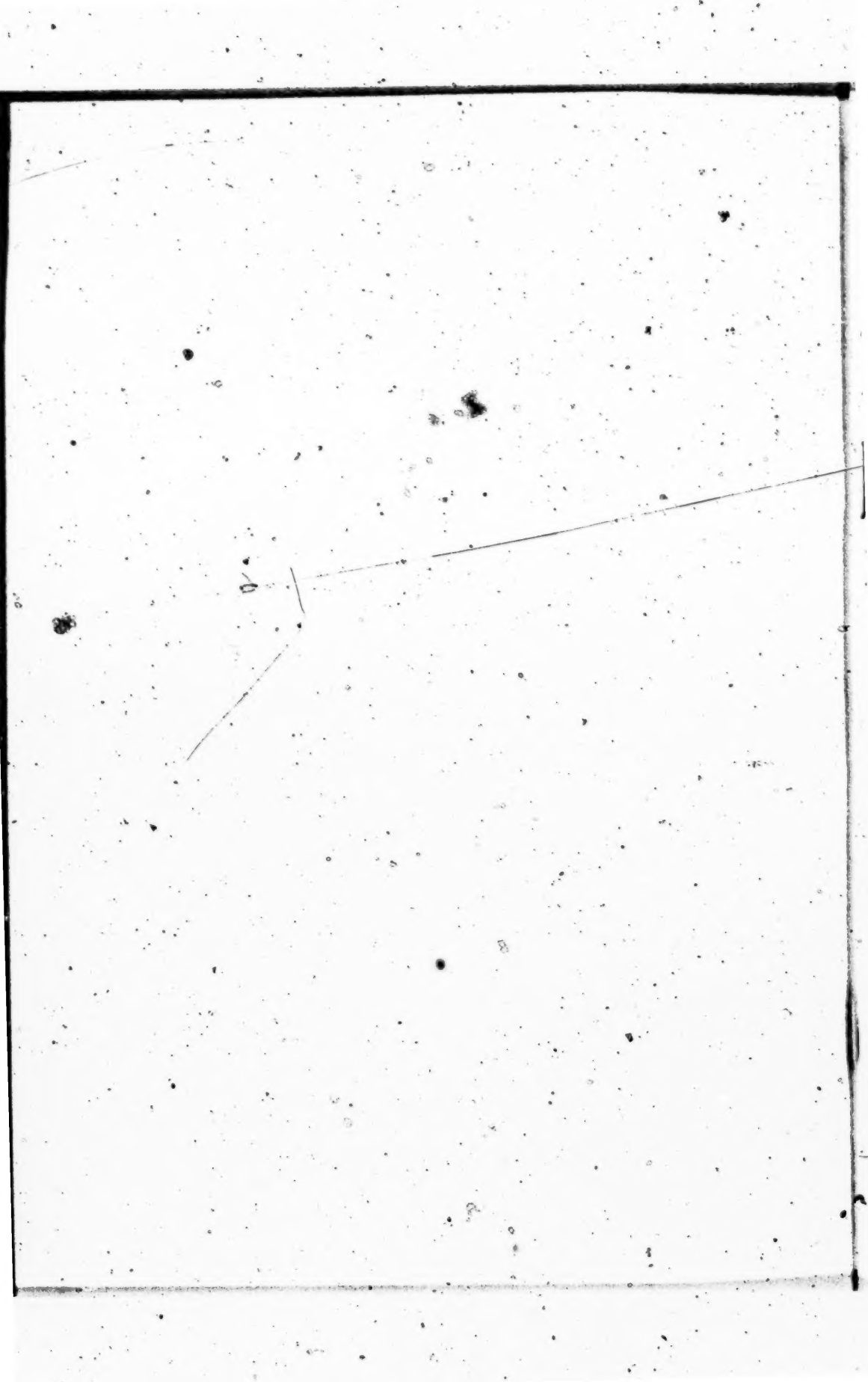

SUPREME COURT, U. S.

No. 1141 and No. 1146

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF NEW YORK ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA ET AL.,
Appellees.

SCHOOL DISTRICT OF PHILADELPHIA ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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IN THE

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No. 1141

CITY OF NEW YORK et al.,

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SCHOOL DISTRICT OF PHILADELPHIA et al.,

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16.1(c) of the Rules of this Court, appellees (other than the United States of America, which is moving separately) move that the order of the United States District Court for the Northern District of Illinois denying intervention in *United States of America* v. *Harper & Row, Publishers, Inc.*, Civil Action No. 67 C 612 and in seventeen related cases, Civil Action Nos. 67 C 613 through 67 C 629, be affirmed.

STATEMENT

These appeals are from an order of the district court entered on November 27, 1967 which denied appellants' motions to intervene under Rule 24 of the Federal Rules of Civil Procedure in eighteen separate but related cases against the defendant publishers.

On April 18, 1967 eighteen complaints were filed by the Antitrust Division of the Department of Justice in the district court alleging that each respective defendant publisher of library editions of children's books had violated the Sherman Act by efforts to maintain wholesalers' resale prices for such books. There was no allegation of horizontal price fixing among the publishers. In each case, the defendant publisher filed an answer generally denying the allegations of the complaint. No testimony or discovery was taken in any case. There were no criminal indictments of the publishers for allegedly engaging in such resale price maintenance.

The appellants here were not parties to the Government cases. Appellants are states and cities, most of which, either before or after the denial of intervention, instituted private actions seeking treble damages and, in some instances, injunctive relief against the publishers.

From the time that the Government cases were instituted on April 18, 1967 until October, 1967, the Government and the defendants were continuously engaged in negotiating a form of consent judgment, for entry in all eighteen cases, which would most expeditiously afford the public the injunctive relief that was the object of the Government actions, without the burden and expense of eighteen trials. On October 23, 1967, the parties filed stipulations embodying their agreement on a proposed consent judgment.

In conformity with the usual practice followed by the Antitrust Division in such cases since 1961, the stipulations provided that the Department of Justice could withdraw its consent to the proposed judgments at any time during a thirty-day period in which interested persons could submit their views to the Antitrust Division. As stated in its published "Consent Judgment Policy," 28 Code Fed. Reg. § 50.1 (1967), the Antitrust Division, during such thirty-day periods, will "receive and consider any written comments, views or relevant allegations" which may indicate that a proposed judgment is "inappropriate, improper or inadequate."

On November 2, 1967 the State of Illinois filed an application for leave to intervene in the eighteen cases in the court below in order to object to entry of the proposed consent judgments. The only quarrel with the consent judgments raised by the application was that they did not contain limited admissions of liability (Application of State of Illinois, p. 15)—i.e., so-called "asphalt clauses" (See pp. 12, 16-17 *infra*). A number of additional such applications followed.

All of the intervention applications were heard on November 13, 1967 by District Judge Abraham L. Marovitz, to whom the Government's eighteen cases had been assigned from their inception. At that hearing, the Government (speaking through the Chief of the Midwest Office of the Antitrust Division) informed the court that the proposed decrees were "very strong" and "comprehensive in their coverage" (Transcript of Hearing, Nov. 13, 1967, p. 63). The Government spokesman went on to say that he assumed that the applicants for intervention were satisfied with the substance of the decrees and added that (*id.* at p. 64):

> "They [applicants] have been aware that we have been negotiating consent decrees since at least the middle of the summer and, to my knowledge, no such constructive suggestions have been made by any states or cities that would be helpful to us in negotiating these decrees."

Earlier in the hearing, the principal spokesman for the applicants conceded that they had not "really attacked the consent order" (*id.* at p. 18). During his rebuttal argument that afternoon, however, he stated that "at lunch" he and some of his colleagues had decided to consider urging substantive changes in the judgments after all (*id.* at p. 127). The applicants then made four such suggestions:

1. The judgments should require the defendants to make all books available in the less-expensive "trade edition" bindings as well as in the more-expensive library bindings (because the defendants had allegedly withheld trade editions in order to force customers to purchase library editions) (*id.* at at pp. 127-128);

2. The judgments should require some kind of compulsory, royalty-free licensing of the copyrights involved in the books which were the subject of the complaints (*id.* at p. 130);

3. The judgments' prohibition against use of the term "net price" should apply to textbooks (which were expressly excepted from this prohibition as contained in Section V of the judgments) (*id.* at p. 131); and

4. The judgments should contain a requirement, in addition to the usual visitorial provisions, that the Antitrust Division must disclose to states, cities and other governmental agencies all information obtained from the defendants through use of the visitorial provisions (*id.* at pp. 144-146).

Notwithstanding his serious doubts about the timeliness of these suggestions (*id.* at pp. 128-129), Judge Marovitz treated the applicants for intervention on an *amici curiae* basis and urged the parties to discuss the four suggestions and report back to him a few days later (*id.* at pp. 159-162). Government counsel urged the applicants to provide the Government with any evidence they might have which would support their suggestions (*id.* at p. 163).

The attorneys for the Antitrust Division then held *five* meetings with respect to these four "suggestions": one meeting with the applicants for "clarification" of what was intended by the suggestions and to ascertain whether the applicants had any evidence to support their proposed changes; a second meeting, with defense counsel to try to explain these suggestions and to receive defense counsel's reactions; a third meeting, with applicants to give the Antitrust Division's views of the suggestions; a fourth meeting, with defense counsel, to explain the Antitrust Division's views; and a fifth meeting, among all the parties and the applicants (Transcript of Hearing, Nov. 16, 1967, pp. 3-5).

In the course of these meetings, the applicants dropped the second and third of their four suggestions, relating to copyright licensing and to use of the term "net" in connection with textbooks. It was explained to the applicants that it would be impossible to incorporate copyright provisions in the judgments since copyrights involve the rights of *authors*, who were not parties to the proceedings. With respect to applicants' objection to exempting textbooks from the prohibition against using the term "net price", it was explained that the "net pricing" of textbooks resulted from *state* requirements. The applicants' principal spokesman was frank to admit that "my only problem there, as I expressed it to the Court, was a

failure to understand it." (Transcript of Hearing, Nov. 16, 1967, pp. 10-12.)

The fourth suggestion, seeking access to any material obtained by the Antitrust Division under the visitorial provisions of the judgment "just by calling the Government," was reduced to a request for impounding for one year any documents obtained by the Division under such visitation rights. As revised with the concurrence of the applicants and with access subject to further court order, the parties agreed to the addition of a paragraph to Section X of the proposed consent judgments (*id.* at pp. 13-14; see Jurisdictional Statement in No. 1141, p. 8c).

The rest of the hearing on November 16, 1967 (Transcript, pp. 16-65) was devoted to applicants' suggestion that the defendants be compelled to publish and have available the same book in several types of bindings, "economic feasibility notwithstanding" (*id.* at p. 42)—a suggestion which forms the basis for an issue urged here by appellants in No. 1141 (Jurisdictional Statement, at pp. 6, 8n. 5a, 16, 25). Counsel for applicants admitted that no one had furnished evidence that any publisher had ever held back books in less expensive bindings (Transcript of Hearing, Nov. 16, 1967, p. 18).

It was pointed out that it would be impractical to compel a defendant to publish the same book in a variety of bindings since this would result in the trial judge's "running the book business" by deciding how many books each publisher should publish in each type of binding (*id.* at pp. 28-33, 44, 47-52). After stating that the Government had "no information to support this charge" (relating to the availability of trade editions) (*id.* at p. 5), Government counsel went on to say that one of counsel for the applicants for intervention "thought he had some facts in his files * * * that would support this" (*ibid.*).

The promised information was not forthcoming, as Government counsel confirmed when the eighteen consent judgments, as modified, were handed up to Judge Marovitz for signature on November 27th (Transcript of Hearing, Nov. 27, 1967, p. 3):

> "With regard to one pending suggestion that was made by the petitioners for intervention with regard to modifying this decree, this was the suggestion that the publishers be required to make trade editions of books available if they have them.
>
> "With regard to this, we have received no further information from these petitioners, so that we still have no information that publishers ever engaged in such a practice."

In entering the decrees, Judge Marovitz said (*id.* at pp. 4-5):

> "I do appreciate the cooperation of all of you in endeavoring to strengthen the decree, in conformity with some of the suggestions made by the amicus in this case.
>
> "I don't see anybody representing them here so I assume they are satisfied with the entry of the decrees."

Simultaneously with entry of the decrees, Judge Marovitz signed a separate order denying the applications for intervention but reciting that all applicants had been permitted to be "fully heard as amici curiae" (Jurisdictional Statement in No. 1141, pp. 1b-5b).

All of the applicants for intervention have appealed at Nos. 1141 or 1146, except the Mayor and City Council of Baltimore and the Board of Education of Chicago.

ARGUMENT

Introduction

The district court's denial of intervention was clearly correct and should, we submit, be affirmed. The appellants have given no cogent reasons, and certainly have cited no authority, to demonstrate that plenary review of the decision below is in any way warranted.

The decision below is correct because:

(1) The basic relief appellants actually seek—an admission of liability by the defendants—is diametrically opposed to the congressional policy of encouraging consent decrees as expressed in Section 5(a) of the Clayton Act; and

(2) As a matter of law, an outside person has no interest sufficient to support intervention in proceedings culminating in the pre-trial entry of consent judgments negotiated by the Government and the defendants, particularly where the outsider's purpose is solely to demand admission of liability by defendants. See *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U. S. 580 (1968).

I.

Appellants' demand for admission of liability in consent judgments is contrary to the express proviso to Section 5(a) of the Clayton Act.

The jurisdictional statements demonstrate that appellants' actual reason for seeking intervention is to urge that the consent judgments were improperly entered because they include "no admissions of the violations charged" (Jurisdictional Statement in No. 1141, p. 3).[1]

This demand flies squarely in the face of declared congressional policy as specifically enacted in the proviso to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). The proviso directs "that this section shall not apply to consent judgments or decrees entered before any testimony has been taken," and accordingly such a negotiated consent judgment may not be "prima facie evidence * * * in any action or proceeding brought by any other party" for treble damages, as otherwise provided in Section 5(a). This long-standing enactment (passed in 1914) was clearly designed by the Congress to encourage negotiated pretrial settlements of antitrust cases.[2] Its proviso has been praised and used consistently by each succeeding Assistant Attorney General in charge of the Antitrust Division. The current Assistant Attorney General recently and forcefully summarized the considerations justifying the

[1] The Jurisdictional Statement in No. 1146, at page 4, restates the same proposition by urging that the district court erred by not insisting that the consent judgments contain "limited admissions * * * of violations * * * of the Sherman Act * * *."

[2] For a comprehensive review of the legislative history of § 5(a) see *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U. S. 644 (1941).

proviso in an address before The Association of the Bar of the City of New York, as follows:

> "For a long time, the settlement of antitrust cases by negotiated consent decrees has been a major factor in antitrust enforcement. From 70 to 75% of civil antitrust cases end up in a consent judgment, most before litigation, some after the Government has secured an adjudication of liability.
>
> "The values served by negotiated settlement are obvious and great. Consent decrees save time and expense for the defendants and the Government, and are a blessed relief to our over-burdened courts. The savings to the Government multiply by many times what can be accomplished with any given amount of inevitably limited enforcement resources. Quick resolution of the issues raised by antitrust attack relieves defendants of the years of costly uncertainty that unresolved litigation imposes on critical business decisions.
>
> "The values to the Government of settlement were early recognized. In enacting Section 5 of the Clayton Act in 1914, making an adjudication of liability in a Government action *prima facie* evidence of liability in any subsequent case brought by a private plaintiff, Congress excepted consent decrees entered before final judgment from the operation of that section for the express purpose of saving the Government needless litigation expense by encouraging defendants to settle. At the same time and for the same reason, *nolo* pleas in criminal cases were excepted from the operation of Section 5. Reconsideration of the latter point is in order. For reasons which I will not restate here, The Department of Justice has given its support to proposed legislation that would bring *nolo* pleas within Section 5. But we have vigorously opposed a simultaneous proposal to make consent decrees evidence of liability in private litigation, for we strongly believe that the damage to

> effective antitrust enforcement that such a proposal would entail would far exceed any possible gain." Turner, "Antitrust Consent Decrees: Some Basic Policy Questions," reported in BNA Antitrust & Trade Reg. Rep., Dec. 19, 1967, p. X-1.

A year earlier, testifying as to the position of the Department of Justice before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, General Turner expressed the Department's opposition to a proposal to amend Section 5(a) of the Clayton Act so as to make consent decrees prima facie evidence in private treble damage suits. He said [*Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S.2512,* 89th Cong., 2d Sess. 86-87 (1966)]:

> "• • • The consent decree program has aided the Government considerably in its efforts to protect competition.• • • While we believe it desirable to provide private plaintiffs with the benefits of Federal enforcement efforts, any benefits secured must be weighed against possible injury to our enforcement program. It is unclear how this proposal will benefit private parties. And, in view of the risk of impairing a vital enforcement technique, we believe it inadvisable to enact a provision giving consent decrees prima facie evidentiary effect."

In answer to a question by the subcommittee chairman, Senator Hart, General Turner said (*id.* at p. 88):

> "• • • I think we get quite significant injunctions and other forms of relief in the consent decree and in view of the enormous saving in resources, it multiplies our efforts. That is, we can get about five times as much mileage out of any group of people through heavy use of the consent decree program than we otherwise could. And I am convinced

> myself that in a good many instances we may well get out of consent decrees, particularly in view of the immediacy of the relief, instead of having to wait for 3 to 5 years, better results than we do going to litigation."

The subcommittee's chief counsel asked General Turner about use of "asphalt" clauses (*id.* at p. 88). General Turner commented (*id.* at p. 90):

> "• • • to compel the Government to insist upon admissions of fact pertaining to guilt would, I believe, seriously discourage people from entering into consent decrees, and I think that would be a very serious blow."

General Turner reiterated these views in a letter written in response to an inquiry by Congressman Celler, Chairman of the House Judiciary Committee, reported in BNA Antitrust & Trade Reg. Rep., March 21, 1967, pp. X-1 to 3.

Thus, the Congress has been presented with a clear choice: to give additional aid to private litigants by abandoning the policy which encourages consent decrees by exempting them from the prima facie effect of Section 5(a) and thereby incur what General Turner characterized as "the risk of impairing a vital enforcement technique" (*Hearings, supra* at p. 86); or to continue the policy in view of its strong support by the Government official having primary responsibility for antitrust enforcement. This is a legislative choice, necessarily involving consideration of the resources made available to the Antitrust Division for its enforcement efforts.

To date, the Congress has not chosen to change the existing policy of encouraging consent decrees. The bill which was the subject of the Senate subcommittee hearings in 1966 (S.2512, 89th Cong., 2d Sess.) was not re-

ported out of committee. Senator Hart reintroduced the bill in the 90th Congress a year ago [S. 1538, 90th Cong., 1st Sess.; see 113 Cong. Record S5020-S5021 (daily ed. April 13, 1967)]. There has been no action on that bill to date.

It is significant to note that two of the witnesses who testified before the Senate subcommittee in 1966 in favor of S.2512 are representing some of the appellants here,[3] a circumstance which places them in the questionable position of urging this Court to do the very thing which they have been unable to persuade the Congress to do.

The value of this policy of encouraging consent decrees is graphically illustrated by the disposition of the present cases. Eighteen civil antitrust cases were expeditiously disposed of within six months after the complaints were filed. The relief contained in the judgments is sweeping: the complaints related solely to publisher resale price maintenance of library editions of children's books, but the broad injunctive language relates to "any books" (Section VI) or simply "books" (Section VII); the injunctive language used prohibits any form of resale price maintenance, directly [Section VI (A)] or by suggestion [Section VI (B)] or by indirection [Sections VI (C), (D), (E) and (F)]; and Section VII, for good measure, picks up any conceivably related contract, agreement or understanding.[4] It is thus clear that the public interest has been completely protected by the consent judgments. Appel-

[3] Mr. Alioto (*Hearings, supra* at pp. 45-56) is on the Jurisdictional Statement in No. 1141. Mr. Kohn (*id.* at pp. 22-30), although not on the Jurisdictional Statement in No. 1146 is one of the attorneys of record for the same parties in their capacity as plaintiffs in *School District of Philadelphia* v. *Harper & Row Publishers, Inc.*, Civil Action No. 40,537 (E. D. Pa.).

[4] The judgment in No. 67 C 612 is reproduced at pp. 1c-9c of the Jurisdictional Statement in No. 1141. The judgments in the other cases are virtually identical.

lants' belated attempts to criticize the substantive provisions of the judgment are obvious quibbles. (See Statement, pp. 4-7 *supra*).

The defendant publishers clearly advised the representatives of the Antitrust Division during the course of the negotiations that they would not forego the inducement specifically provided in Section 5(a) of the Clayton Act and, therefore, that they would not consent to sweeping injunctions if it were also demanded that they admit liability for any purpose.

"Needless litigation" was thus avoided "by encouraging defendants to settle" (Turner, *op. cit. supra*) as contemplated by Section 5 (a) of the Clayton Act. The length of time which would have been required to prepare and try eighteen separate, substantial antitrust cases and obtain broad final injunctive relief in each of them—even assuming the Government could have fully sustained its allegations—will be obvious to this Court.[5] Equally apparent is the monumental expense that the Government and the defendants would have incurred had such litigation been necessary.

Appellants, as noted, are not parties to these cases. They seek to obtain treble damages, and in some cases injunctive relief, in other proceedings under the antitrust laws. Their sole reason for seeking intervention here is to demand admissions of liability which might aid their private claims. So viewed, appellants' contentions on this appeal are nothing more than an expression of dissatisfaction with the congressional policy embodied in

[5] The Government was by no means ready to go to trial in any of the eighteen cases. Substantial discovery was contemplated by the Government. See Transcript of Hearing, July 31, 1967, p. 5. A recent note points out that the average time required to obtain a litigated judgment is five years. Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303, 1305 (1967).

the proviso to Section 5(a) of the Clayton Act. Appellants would obviously prefer that the proviso simply not exist. The fact is, however, that the proviso does exist; the fact is that its policy is salutary and has been long recognized as such; and the fact is that this expressed congressional policy has been applied here.

We respectfully submit that appellants' dissatisfaction with the statute would be more appropriately addressed to the Congress than to this Court. As the court declared in *United States* v *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657, 662 (E.D. Wisc. 1962):

> "No one can question but what it was also the intent of Congress in enacting § 5 to aid treble damage claimants in the prosecution of their suits. When that section is read in full, however, it is most clear that the benefits to treble damage claimants come into being and inure to them *only when defendants have failed to take advantage of the inducement offered in that section.*
>
> "It may well be that Congress itself may wish to re-examine the proviso in § 5. And it may well be that after re-examination, Congress would subordinate its present expressed policy of inducing early compliance with the antitrust laws without protracted litigation to the interests of treble damage claimants. This, of course, is a matter for Congress to decide. *However, until Congress so acts, its present express policy should not be subverted by the adoption and imposition of a policy that would thwart the ends sought to be attained by Congress.*" (Emphasis added.)

To the same effect are: *United States* v. *Ward Baking Co.*, 376 U. S. 327, 334 (1964); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 148 (S.D.N.Y. 1962); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 374 (D. Minn.

1939), *aff'd*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U. S. 644 (1941). Unless and until the Congress should repeal or amend the proviso to Section 5(a) of the Clayton Act, we submit that the courts should continue to permit the executive branch of the Government to use its discretion in implementing the proviso in the interest of achieving efficient and effective antitrust enforcement.

II.

Appellants' arguments for ignoring the clear congressional mandate of Section 5(a) are spurious.

1. The "asphalt clause" argument.

Appellants rely heavily on the fact that once, in fifty-four years of consent judgment history, the Department of Justice apparently requested, and one group of defendants voluntarily agreed to, some kind of admission that they violated the Sherman Act. *United States* v. *Lake Asphalt & Petroleum Co.* and related cases, CCH. Trade Reg. Rep. (1960 Trade Cas.) ¶¶ 69,835, 69,878, (1961 Trade Cas.) ¶ 69,923 (D. Mass. 1960). Those cases involved allegations of horizontal price fixing and bid rigging in sales of asphalt, road tar and bituminous concrete.[6]

Contrary to the assertion by appellants in No. 1141 (Jurisdictional Statement, pp. 10-11), the Government has never made insistence on an asphalt clause an "integral part" of its enforcement policy. Whatever may have caused the Government to seek the admissions in the asphalt cases is not part of the public record. Nor does it

[6] It is noteworthy that there, criminal cases were initiated by the Government, a factor not present here. *United States* v. *Lake Asphalt & Petroleum Co.* and related cases, Cr. Nos. 165-M, 166-M, 167-M (D. Mass.)

appear why the defendants voluntarily made such admissions. Here, the defendants refused to do so, and the Government concluded not to press the issue. The asphalt cases clearly cannot be cited for the proposition that defendants must admit a violation of law before the court can approve a consent judgment—or even that a district court should, under any circumstances, require such an admission when the Government has not insisted on it. The mere statement of such a proposition is its own refutation, especially when it is contrasted with the precisely opposite command in the proviso to Section 5(a) of the Clayton Act.

Congressional policy has been expressed with unusual clarity in Section 5(a). The fact that *once* in history—at a different time, in a different case, under different circumstances—*both* the Government and all parties *chose voluntarily* to waive the proviso, is no warrant for adopting the appellants' position that this Court should now judicially repeal the legislative policy embodied in the proviso.

2. The *nolo contendere* pleas argument.

Appellants also attempt to rely on criminal cases in which the courts have rejected pleas of *nolo contendere*. Whatever may be the governing factors in criminal proceedings involving *punishment for past offenses*, we submit that the policy considerations are vastly different in civil proceedings under Section 4 of the Sherman Act seeking only injunctive relief relating to *future* conduct. The Assistant Attorney General in charge of the Antitrust Division has clearly perceived and articulated this distinction (See pp. 10-12 *supra*).

3. The public or quasi-public bodies argument.

Appellants seek to avoid the impact of the proviso to Section 5(a) of the Clayton Act by contending that the proviso should be suspended or ignored when the aspiring intervenors are public or quasi-public bodies rather than private parties. Had the Congress intended any such differentiation among litigants, it could easily have expressly said so. The Congress not having done so, there is surely no justification for appellants' position that the courts should make such a differentiation.

Moreover, and signally, there is no more necessity to encourage states and municipalities to institute private treble damage actions than there is to induce private parties to do so. This is especially true where, as here, the size and strength of the appellants far outweighs that of the defendant publishers, many of which are relatively small, family-owned businesses.[7]

The public and quasi-public bodies here are not suing in their governmental capacity, but in their proprietary capacity—that is, as entities allegedly wronged when they entered the market place to purchase goods needed for their operations. In *Georgia* v. *Evans,* 316 U. S. 159 (1942), this Court specifically held that a state was a "person" allowed to maintain a treble damage action because the state (unlike the United States) has no other rights or powers under the antitrust laws. This Court reasoned that since a state does not have the power of a governmental unit in the antitrust area, it should be given the *same* rights as a *private party* to recover antitrust

[7] For instance, the complaints alleged that recent, annual national sales of library editions of children's books by the defendant publishers ranged from a low of $100,000 to no more than $5,000,000, with sixteen of the eighteen publishers having sales of $2,000,000 or less.

damages sustained when it enters the market. The rationale of *Georgia* v. *Evans* defeats appellants' attempts to distinguish their situation from that of private parties.

4. The federal money argument.

Equally ineffectual is appellants' contention that the proviso to Section 5(a) should be ignored because federal money, in part, has been used to purchase books.

In the first place, that is a policy argument which is more appropriately addressed to the Congress. Moreover, it is the Department of Justice which is responsible for enforcement of the rights of the United States under Section 4A of the Clayton Act, 15 U.S.C. § 15a, by instituting suits for injury to its "business or property." And the Department of Justice has balanced this factor and the needs of the public generally and then decided to exercise its responsibility by approving these consent judgments as they stand.

In sum, appellants' only reason for advocating that the judgments below be upset is a self-serving desire that their private claims be litigated not by themselves but by the United States Government. This desire cannot override the Government's decision to proceed in accordance with the clear and unqualified congressional policy expressed in Section 5(a) and thereby secure the obvious benefit contemplated by the proviso. Appellants' quarrel with the Government's decision to utilize that policy presents no substantial question for review by this Court.

III.

Appellants have no interest in these actions to justify intervention.

As already noted, appellants' essential and only purpose in seeking intervention is to obtain assistance in their respective private treble damage actions.[8] This is plainly not an "interest" that justifies intervention. Rule 24, Fed. R. Civ. P.

This Court has emphatically held that an outsider's request for individual *injunctive* relief cannot preclude entry of a consent judgment in an action under Section 4 of the Sherman Act brought by the Justice Department and that accordingly the outsider has no interest which can justify intervention in such an action. *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961). There, this Court said:

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. * * * '" * * * [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.'" *Id.* at 347 U. S. 518-519.

[8] The School District of Philadelphia and City of Philadelphia, appellants in No. 1146, commenced their action for treble damages and injunctive relief on June 24, 1966—*ten months prior* to the filing of the Government cases on April 18, 1967. *School District of Philadelphia et al.* v. *Harper & Row Publishers, Inc. et al.*, Civil Action No. 40,537 (E.D. Pa.).

> "This principle is certainly broad enough to make it clear that just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation. * * * Indeed § 5 of the Clayton Act (15 USC § 16), making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a § 4 private suit, would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter.
>
> "Regarding appellants' position in the case from this aspect, we conclude that they were not entitled to intervene as of right." * * *" (336 U. S. at 689-690.)

Appellants contend that the *Sam Fox* rationale was changed by this Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1967) and the recent amendment of Rule 24, Fed. R. Civ. P. But *Cascade* stands on its own peculiar facts. The intervenors there were *not* seeking assistance for a private antitrust suit, as are appellants here. Rather the intervenors there were seeking to have this Court's earlier mandate of divestiture made effective—relief not practically obtainable in any separate action the intervenors could commence.

That the *Cascade* rule is specifically so limited has been demonstrated by subsequent decisions. After the *Cascade* case and the 1966 amendment of Rule 24, this Court has twice summarily affirmed judgments denying intervention in Government antitrust actions. The first of these was *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo.), *aff'd sub nom. Lupton Mfg. Co.* v. *United States*, 388 U. S. 457 (1967), where the district court had stated:

> "There is considerable authority to support the view that no one other than the government should be permitted in this law suit at this time and none to support intervention." (At p. 344.)

The second was *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968), where the district court refused to permit intervention by outsiders dissatisfied with the substantive terms of a consent judgment. The district court specifically held that the would-be intervenors had no "interest" to support intervention (272 F. Supp. at p. 438):

> "Petitioners have not demonstrated the existence of any 'interest relating to the property or transaction' which is the subject of the Government's suit which might support their application to intervene."

Noting that the applicants for intervention, there as here, were plaintiffs or prospective plaintiffs in pending private actions under the antitrust laws, the district court went on to say (*ibid.*):

> "None of their 'interests' are in any way 'impaired or impeded' by settlement of the Government's case. Nor is their ability to prosecute their respective cases impaired or impeded by the Government's case. The speculation that petitioners may be benefited in the trial of their respective cases if the Government is forced to litigate its case certainly does not give them an 'interest' in the Government's case sufficient to support the motions to intervene."

This holding applies here with even greater force, since here the would-be intervenors' only real quarrel with these consent judgments is that they contain no admissions of liability.

Because of the strength and recency of the *Blue Chip* case, appellants have attempted to distinguish it in a number of ways. Appellants in No. 1146 erroneously state (at p. 18 n. 7) that the *Blue Chip* case is distinguishable because there "The consent decree had been the subject of prolonged negotiations and modifications." In light of the history of these cases (see Statement *supra*) it can hardly be argued that the judgments here were not the result of "prolonged negotiations and modifications."

Appellants also rely on the fact that the prospective intervenors' motions in *Blue Chip* were not made before the entry of the consent decree. But this attempted distinction ignores the fact that the would-be intervenors in *Blue Chip* were fully heard as *amici curiae* in the district court before entry of the challenged decree.[9] The attempted distinction also ignores the lengthy and explicit discussion by the district court in *Blue Chip* concerning factors other than timeliness bearing on the right to intervene in antitrust cases. The district court clearly indicated that the proposed intervenors' applications would have been denied whether or not they had been timely made. (272 F. Supp. at 438, 440.) Thus, there is no warrant for the inference, urged by the appellants here, that this Court's summary affirmance of the denial of intervention motions in *Blue Chip* was grounded solely on the technicality that the formal motions to intervene were not made until after the decree had been entered.

Finally, appellants argue at length that the court below abused its discretion in denying permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. This argument is specious. As we have pointed out above,

[9] Motion of United States to Affirm, Nos. 820 and 849, Oct. Term 1967, pp. 3-4.

the district court allowed appellants all of the practical benefits of intervention, and it so indicated (Transcript of Hearing, Nov. 16, 1967, p. 61). Appellants submitted briefs to the court and made extensive oral arguments on two occasions. One of their last minute demands resulted in a modification of the decrees.[10] Regardless of their formal status, appellants were fully heard.

Thus appellants' plaint is actually reduced to the district court's refusal to satisfy their desire to have the consent judgments contain admissions of liability. This contention, as we have demonstrated and as the district court ruled, is without merit.

[10] Appellants obtained additional relief in that information submitted to the grand jury was impounded. See the recital in the court's order denying intervention (Jurisdictional Statement in No. 1141, p. 3b) and order entered November 20, 1967.

CONCLUSION

The order of the district court denying appellants' motions to intervene should be affirmed.

Respectfully submitted,

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